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IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, EUGENE J. BLACKMAN, A. EDWARD JOHNSON, WILLIAM S. WELLS, JOHN TOWERS, ALMOMT C. HIXON, WILLIAM T. MOORMAN, JOHN L. CALVERT, RICHARD H. KNIGHT and JOHN W. CAPERS, COUNCILMEN OF THE CITY OF GUTHRIE, OKLAHOMA TERRITORY,

Plaintiffs in Error

vs

C. W. TURNER and JAMES A. KIRKWOOD

Defendants in Error.

October Term 1906

No. 178

(20,036)

BRIEF OF PLAINTIFFS IN ERROR

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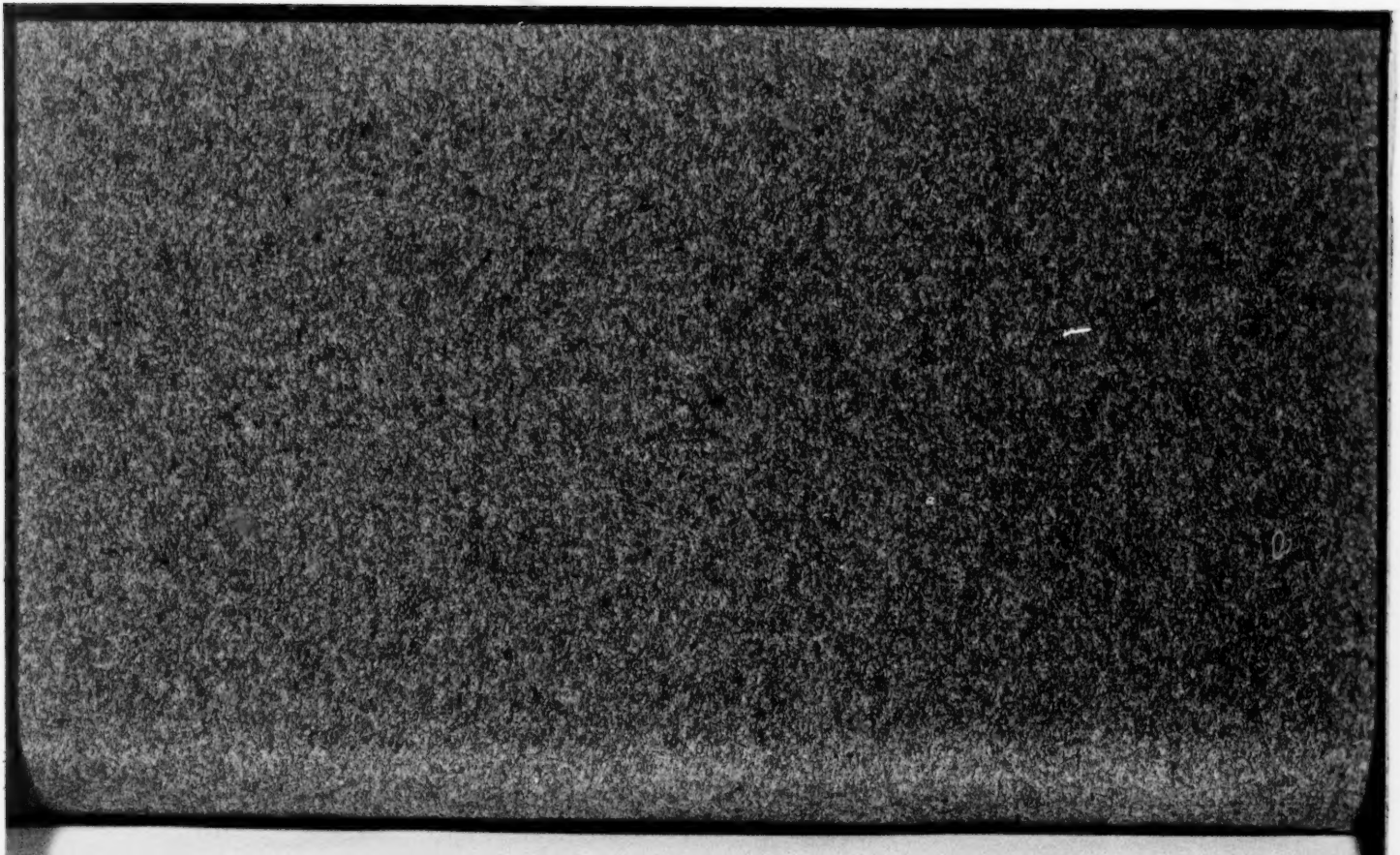

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STATEMENT OF THE CASE.

This action, being a proceeding in mandamus, was commenced in the District Court of Logan County, Oklahoma Territory, on the 23rd day of July, 1903 (Rec. p. 10) by the defendants in error, Turner and Kirkwood, against C. M. Barnes,

Mayor, and certain others as Councilmen of the City of Guthrie, Oklahoma Territory, by filing their petition in said court. (Rec. p. 11) wherein they alleged the official capacity of the Mayor and Councilmen, their duty as such officials to levy a tax upon the property of persons residing in the Territory covered by the various old provisional governments known as Guthrie Proper, East Guthrie, West Guthrie and Capitol Hill, now embraced in the City of Guthrie, to provide for the payment of certain warrants that had been issued under the provisions of a special Act of the Territorial Legislature approved December 25, 1890, and also alleging the refusal of said officials to make such levy and praying for a Writ of Mandamus to compel the officials to make the levy. To this petition and the alternative writ the Mayor and Councilmen of the City of Guthrie, the predecessors in office of the plaintiffs in error, filed an answer and return (Rec. p. 18), in the third paragraph of which the Statute of Limitations was pleaded (Rec. p. 19). It was alleged in the answer that the levy sought to be compelled, was a liability imposed by Statute, and should have been brought within three years from the time the action accrued, and that the action had accrued more than three years before it was brought, and in fact it had accrued on the 7th day of September, 1895, upon which date the then holder of said warrants had commenced an action in mandamus, in said court to compel the Mayor and Councilmen of said City of Guthrie to levy a tax to pay the same; and in the fourth paragraph of which, it was alleged that one W. H. Gray, as Receiver of the National Bank of Guthrie, was the predecessor in interest of the said Turner and Kirkwood, in said warrants, and that he owned and held the same in 1895, and that he commenced an action in mandamus, identical with this, on the 7th day of September, 1895, to compel the Mayor and Councilmen of the said City to make a levy to pay said warrants, and that a peremptory writ was awarded by said District Court, and the cause appealed to the Supreme Court of the Territory, and reversed, and remanded to the District Court (See Martin, *et al* vs. Territory of Oklahoma *ex rel* W. H. Gray, Receiver, 5 Okla. 188), where it was revived in the names of Turner and Kirkwood, and by them dismissed

on the 28th day of June, 1901, and it was further answered that this action was not brought within one year after such dismissal. Copies of the pleadings and other proceedings in the first mandamus suits were attached as exhibits to the answer (Rec. p. 22 and 37 inclusive.)

Turner and Kirkwood replied to the answer and return, denying all the material allegations therein, and the case was tried in the District Court of Logan County on the 23rd day of December, 1903. Upon the trial of the case it was admitted by the defendants, the City officers, that prior to the time of bringing the action no levy had been made for the payment or discharge of the warrants described and that no money was then or had been in the hands of the Treasurer of the City of Guthrie to pay any of said warrants (Rec. p. 39), and it was admitted by the plaintiffs, Turner and Kirkwood, that the W. H. Gray, Receiver, mentioned in the third paragraph of defendants' answer was the legally appointed Receiver of the National Bank of Guthrie and successor to Harper S. Cunningham, to whom the warrants described in the Alternative Writ were issued, and that as such Receiver, W. H. Gray was the holder of said warrants, and that during the summer of 1895 he made demand upon the then Mayor and Councilmen of the said City of Guthrie to levy a tax for the payment of said warrants, pursuant to the provisions of said special Act of the Territorial Legislature, and it was further admitted that all the allegations and facts pleaded in the fourth answer or return to the Alternative Writ, relating to the bringing of the first suit in mandamus by Gray, Receiver, its appeal to the Supreme Court, reversal and subsequent dismissal by Turner and Kirkwood, were true as pleaded (Rec.p. p. 39 and 40.)

The warrants for the payment of which, the tax levy was sought to be enforced, are seventeen in number and are numbered, dated, are in amount and due as shown by the following list:

No.	Date.	Amount	Due.
1	July 1, 1893	$273.77	July 1, 1894
2	July 1, 1893	273.77	July 1, 1895

3	July 1, 1893	273.77	July 1, 1896
4	July 1, 1893	273.77	July 1, 1897
5	July 1, 1893	273.77	July 1, 1898
6	July 1, 1893	554.15	July 1, 1894
7	July 1, 1893	554.15	July 1, 1895
8	July 1, 1893	554.15	July 1, 1896
9	July 1, 1893	554.15	July 1, 1897
10	July 1, 1893	554.15	July 1, 1898
16	July 1, 1898	7.60	July 1, 1894
21	July 1, 1893	34.80	July 1, 1894
22	July 1, 1893	34.80	July 1, 1895
23	July 1, 1893	34.80	July 1, 1896
24	July 1, 1893	34.80	July 1, 1897
25	July 1, 1893	34.80	July 1, 1898
40	July 1, 1893	11.22	July 1, 1898

All of these warrants bear interest at the rate of six per cent from June 3rd 1891, and are all similar in form. A copy of one of them being as follows:

"Warrant of the City of Guthrie, Oklahoma Territory.

"554.15 No. 6.

"Treasurer of the City of Guthrie.

"One year after date pay to the order of Harper S. Cunningham, Receiver National Gank, Guthrie, the sum of five hundred and fifty four and 15-100 dollars with interest thereon at the rate of six per centum per annum, from June 3rd, 1891, from any moneys which shall arise from special levy for the payment of City warrants issued under the provisions of chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, upon the sub-division of Guthrie known as East Guthrie.

"By order of the City Council July 1, 1893.

"A. M. McELHINNEY, Mayor.

"Attest, E. G. Millikan, City Clerk.

Judgment was rendered by the District Court, awarding a peremptory Writ of Mandamus against the Mayor and Coun-

cilmen (Rec. p. 40.) and after a motion for a new trial (Rec. p. 43) was filed, considered and overruled, the cause was taken by proceedings in error to the Supreme Court of the Territory where it was urged that the District Court had erred in rendering judgment allowing a peremptory writ and had erred in holding that the Statute of Limitations had not barred the action in mandamus, and in holding that the action had not accrued at the time W. H. Gray, Receiver, the predecessor in interest of Turner and Kirkwood, commenced the first action in mandaums.

The Supreme Court of the Territory affirmed the judgment of the District Court (Rec. p. 46), and in the opinion handed down by the Supreme Court, in support of its judgment of affirmance, it is held "that an action in mandamus is simply a preliminary step toward the enforcing of payment of the warrants, and if the Statute of Limitations could not be urged as against the collection of a debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof (Rec. p. 51.)

Afterwards, leave was taken to substitute the present Mayor and Councilmen of the City of Guthrie, in place of those who had gone out of office (Rec. p. 54), and they prosecute this writ of error, in this court.

SPECIFICATION OF ERRORS.

The assignment of errors, filed in connection with plaintiffs in error's petition for a writ of error, appear on pages 3 and 4 of the printed record and allege error on the part of the Supreme Court affirming the judgment of the District Court allowing the peremptory Writ of Mandamus and in holding that the action was not barred by the Statute of Limitations, and that this action did not accrue until there was money in the treasury to pay the warrants described etc. But more specifically speaking, we contend as follows:

1. That the rule, "that in an action upon a municipal warrant, the Statute of Limitations does

not commence to run against such action until there is money in the treasury to pay the same," does not apply to an action in mandamus to compel a tax levy to pay such warrant.

2. That, even in an ordinary suit for a money judgment on a municipal warrant against the municipality issuing it such action accrues when the moneys are in the treasury to pay it, *or when sufficient time has elapsed for the collection of the same,* and that the Statute of Limitations begins to run from the time of such accrual.

3. That in this case, it should be determined as a matter of law, that sufficient time had elapsed to collect the money, at the time the first suit in mandamus was brought.

4. That this action is upon a liability created by statute, and is barred by the three years limitations statute.

5. That this action not having been commenced within one year from the time the first action was dismissed, it is barred.

6. That all of said warrants having a fixed time of payment, an action accrued on each, when payment was not made at the time fixed.

OKLAHOMA STATUTES.

The special Act of the Oklahoma Legislature, under which said warrants were issued is as follows:

"An Act for the purpose of Providing for the Allowance and Payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie. (Took effect December 25, 1890.)

"*Be it enacted by the Legislative Assembly of the Territory of Oklahoma*:

"Section 1. That the district judge of Logan county is

hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

"Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a bona fide claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

"Sec. 3 The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of first publication mention in this section shall be forever precluded from so doing hereafter.

"Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them, and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval by the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the villages to the holders and owners, payable in installments each of the amounts to be in one, two, three, four and five years to bear interest at the rate of six

per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each sub-division heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils the mayors and school boards heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

"Sec. 5. That said commission or referee shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees upon the order of the district judge.

That this act take effect and be in force from and after its passage and approval."

(See Okla. Rev. Stat. 1893 page 156.)

The Oklahoma Statutes of Limitation applicable to this discussion are found in the following sections of the Code of Civil Procedure, 2nd Vol. Wilson's Revised Statutes, page 973-975 inclusive, and are as follows:

"Section 18. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years, an action upon any contract, agreement or promise in writing.

"Second. Within three years: an action upon a contract not in writing, express or implied; *an action upon a liability created by statute, other than a forfeiture or penalty.*

"Third. Within two years: an action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in

such case shall not be deemed to have accrued until the discovery of the fraud.

"Fourth. Within one year: an action on a foreign judgment; an action for libel, slander, assult, battery, malicious prosecution, or false imprisonment; an action upon a statute for penalty or for forfeiture, except where the statute imposing it prescribes a different limitation.

"Fifth. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute, can only be brought within five years after the cause of action shall have accrued.

"Sixth. An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued.

"Sec. 20. An action shall be deemed commenced, within the meaning of this article, as to each defendant at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.

"Sec. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

ARGUMENT.

1. *That the rule, "that in an action upon a municipal warrant, the Statute of Limitations does not not commence to run against such action until there*

is money in the treasury to pay the same," does not apply to an action in mandamus to compel a tax levy to pay such warrant.

To say that an action in mandamus against the officers of a municipality to compel them to levy a tax to raise a fund to pay a municipal warrant, will not accrue until such money is already in the treasury with which to pay the warrant, is an absurdity. It is equivalent to saying that a suit on a promissory note will not lie, until the note has been paid. It is saying that the thing must be first done, before a suit will lie to enforce the doing of it.

The logical result of applying such a rule in this case, would necessitate the holding that this action in mandamus had not yet accrued. The reasoning of the Supreme Court of the Territory to the effect "that an action in mandamus is merely a preliminary step toward the enforcing of payment of these warrants, and if the statute of limitations could not be urged as against the collection of the debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof," is neither logical nor is it a correct statement of the law. Because a warrant holder may wait until there is money in the treasury before bringing suit to enforce the collection of his warrant, it does not follow that he may wait until after the expiration of the Statute of Limitations, before making an effort to have the money placed in the treasury. The Statute of Limitations prescribe the time within which every action must be brought; each action must stand or fall by itself, and it is of no consequence as to what may be its relation to some other action, whether preliminary or otherwise. If it is merely a preliminary step, then the preliminary step must be taken within the time prescribed by law. In fact, it is not a mere preliminary step, it is the only remedy the defendants in error have ever had, and they should have used it promptly and within the period of limitation. No relation of debtor and creditor ever existed between the plaintis in error and defendants in error. These warrants do not even represent an indebtedness of the muni-

cipality of which the plaintiffs in error, are officers. After the dismissal of the first mandamus suit, Turner and Kirkwood brought a straight suit against the City of Guthrie upon these same warrants, wherein they sought a money judgment against the City for the amount thereof. The Supreme Court of the Territory in affirming the judgment for the defendant said:

"The warrants here sued on were not issued in payment of any debt contracted by the city of Guthrie, but are created as legal obligations entirely by the Act of the Territorial Legislature, and, according to the interpretation put upon that act by the Supreme Court of the United States, they were claims against the municipal corporation which is no legal obligation, but which the legislature thinks has sufficient equity to make it proper to provide for their investigation and payment. Thus it will be seen that prior to the statute these warrants would not have been of any legal effect against anybody, but were, by the statute, made an obligation against the property of residents of Guthrie Proper, East Guthrie, West Guthrie and Capitol Hill, and this fact appears upon the face of each warant."

Turner et al. vs. City of Guthrie, 13 Okla. 26.

One of the best considered decisions upon this question, and one which clearly distinguishes the case at bar from those cases which hold that the Statute of Limitations does not run against a municipal warrant until the money is in the treasury to pay it, is the case of Barnes vs. Glide et al. 117 Cal. 1, 48 Pac. 804; It was an action in mandamus to compel Glide and his co-defendants, who were trustees of a swamp-land district, to levy a tax to pay certain warrants. We quote the following from the opinion:

"A proceeding in mandamus between two private parties to enforce a money obligation, where there is no statutory provisions giving it a different character, is generally considered as a mere action at law, in which case all ordinary rules of practice, including the statute of limitations, apply. In Com. Wealth v. Dennison, 24 How. 97, the Supreme Court of the United States says:'It is equally well settled that mandamus in modern practice is nothing more that an action at law between the parties.'

"The date of the last warrant set up in the complaint is

1881,—more than fourteen years before the commencing of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than six months prior to the commencment of the suit. The warrant sued on was issued, if at all, by other trustees, who were in office from fifteen to eighteen years before this proceeding was instituted. They may have been issued illegally; they may have been issued without consideration and fraudulently; * * * And the evident purpose of the statute of limitations is to prevent such a condition of affairs and to preclude parties from disturbing that repose which is intended to be final after the lapse of certain periods of time designated in the statute itself."

"Appellant relies greatly on Freehill vs. Chamberlain, 65 Cal 603, 4 Pac. 646, but that case is not pertinent to the case at bar, that case was simply mandamus to the Treasurer of the City of Sacramento to compel him to pay the interest on certain bonds. * * * All that the court decided in Freehill vs. Chamberlain was that no cause of action in mandamus against the City Treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted."

That case, being a proceeding which might have been instituted fifteen years before it was, the court held that the statute of limitations had run against it, and so we say in the case at bar that it is a case which not only might have been, but actually was commenced the first time, eight years before this second action in mandamus was commenced, and that therefore, the statute of limitations has run against it.

The case of Prescot vs. Gonser, 34 Iowa, 175, was an action in mandamus by a warrant holder to compel the county clerk to attach his seal to a warrant; this case is an exemplification of the distinction between a suit on a warrant and an action in mandamus to compel the performance of an official duty; the court in the opinion said:

"The demand of the plaintiff was not necessary to create the duty, but only as a preliminary step to the enforcement

of the remedy for a breach of official duty, which breach was complete without a demand. The demand was to be made by the plaintiff. This act devolved upon him as much as the act of procuring an original notice to be served upon the defendant, and each was necessary as preliminary to the writ of mandamus. To allow him to suspend the operation of the statute of limitations by his own neglect to make demand, would be to permit him to take advantage of his own wrong. * * *

"We are of the opinion that the clause of the statute above quoted is applicable to this case. The act complained of is 'the omission of an official duty,' by 'a public officer, whereby he incurred a liability.' He rendered himself liable to the action of mandamus, by a failure to perform a duty specially enjoined by law upon him in his official capacity. This liability he incurred by the omission of an official duty, which brings the case within the above mentioned provision of the statute. Holding that the action was barred in three years from the time when the cause of action accrued, and that the statute commenced to run when the plaintiff had a right to demand performance of the duty omitted, and immediately bring his action, if performance was refused, the demurrer was properly sustained on this ground, and the judgment of the court below is affirmed."

And so the case at bar is not an ordinary suit on warrants to recover a money judgment, but the act complained of is the omission of official duty by certain public officers whereby they incurred a liability. They rendered themselves liable to the action of mandamus, by a failure to perform a duty specially enjoined in law upon them in their official capacity. In the eighth paragraph of the petition, of the plaintiffs below and also in the Writ it is alleged that it was the duty of the mayor and city council to levy this tax, and in the ninth paragraph it is alleged that they failed to levy it (See rec. 17) and this failure to so levy the tax is the act complained of, the real gist of this action in mandamus. And it will avail the defendants in error nothing, that they allege that they made a demand for this levy in July 1903, in the face of the fact that their predecessor had made such demand prior to the beginning of the first suit in 1895, (See plaintiff's admission, rec. page 34 & 40) and, anyway, under the authority above cited, one cannot pre-

vent the statute of limitations from running by failing to make demand.

The gist of the action being the failure of the mayor and city council to make the levy which occurred in 1895 and prior thereto, and this action not having been commenced until July, 1903, it follows that this action, as in the case above cited, was barred by the three year statute of limitations.

2. *That, even in an ordinary suit for a money judgment on a municipal warrant against the municipality issuing it such action accrues when the moneys are in the treasury to pay it, or when sufficient time has elapsed for the collection of the same, and that the Statute of Limitations begins to run from the time of such accrual.*

3. *That in this case, it should be determined as a matter of law, that sufficient time had elapsed to collect the money, at the time the first suit in mandamus was brought.*

Those cases which hold that the Statute of Limitations does not run against an action upon a municipal warrant, until there is money in the treasury with which to pay the same, are all based upon the proposition that the cause of action does not accrue until the money is in the treasury, or sufficient time has elapsed to collect it, but none of them go to the extent of holding that where the cause of action has accrued, and a first action actually been brought, and afterwards dismissed, and a new action commenced after the period designated in the statute had expired, that the statute does not run against such new action. It will be observed of course that the reversal, and subsequent dismissal of the first action in mandamus was not for the reason nor upon the ground that the action had not yet accrued, nor because it was prematurely brought (Martin et al vs. Gray, Receiver, 5 Okla. 188).

The leading cases which establish this general rule are King Iron Bridge Co. vs. Otoe, 124 U. S. 459, and Lincoln Coun-

ty vs. Luning, 133 U. S. 529. In the Iron Bridge Co. vs. Otoe, it is said:

"Whoever deals with a county and takes in payment of his demand a warrant in the character of these, no time of payment being fixed, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed."

"The cause of action did not accrue when the payment was refused, but only when the money for this payment is collected, *or time sufficient for the collection of the money has elapsed.* We cannot say, as a mater of law, that this was more than five years before the comencement of the action."

This decision is based upon the proposition that the cause of action would not, and did not accrue until there was money in the treasury to pay the warrants, or until a sufficient time had elapsed for the collection of the same. Reasoning from this proposition, the consistent and logical conclusion is reached, that such an action, is not barred by the statute. But in the case at bar there is no question but that the cause of action accrued in 1895, because the first action was then commenced. In a case where the court can hold that an action has not accrued until a certain time or the happening of a certain contingency, it is consistent and logical to hold that the statute had not run until the expiration of the statutory period after such time or the happening of such contingency, but whenever an action accrues, the statute certainly begins to run, and will continue to run until it operates as a bar, unless the action is commenced within the statutory period.

Two things will start the running of the statute; one is the money in the treasury to pay the warrant, and the other the elapsing of sufficient time to collect the money. The holder

of the warrant in the case at bar decided that a sufficient time had elapsed to collect the money in Septmber, 1895, and no one has disputed him, and having so decided, and having acted thereon by bringing his first suit, he and his successors are now estopped from saying that a sufficient time had not then elapsed, or that the action did not then accrue, or that the statute did not then begin to run.

In the case of Lincoln County vs. Luning, 133 U. S. 529, it was held that a later act of the legislature providing for registration and payment in a particular order, was a new provision for the payment of the bonds in controversy, which was accepted by the creditor, and created a new right upon which he might rely. It is also said in that case, "That when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided." But in the case at bar these plaintiffs in error were not the debtors, nor is the municipality, whose officers they are, the debtor, as has been conclusively determined in Turner et al. vs. City of Guthrie, supra. It has not been mere neglect nor delay on the part of the mayor and council to levy this tax. It is a part of the judicial history of this Territory, that the payment of these old warrants, has been steadily resisted, and the gauge of battle was thrown down when the time came to make the levy. The warrant holder demanded that the levy be made, the mayor and council refused, and thereupon the first action of mandamus was commenced. It was not contended, or even suggested by anybody, on either side, at that time, that the action in mandamus had not then accrued.

The case of Freehill vs. Chamberlain, 65 Cal. 603, 4 Pac. 646, is cited with approval in the Luning case, but we have already observed how the Freehill case is distinguished from a case like the one at bar by the same court, in the later case of Barnes vs. Glide, supra.

We submit that there is a clear and well defined distinction between those cases where it is held that an action in mandamus does not accrue against a treasurer to compel him to pay

money on warrants, until there is money in his hands to pay, or where it is held in a suit on a warrant, issued by a municipality, that the action does not accrue until there is money in the treasury, or a reasonable time has elapsed for the money to have been collected by the ordinary governmental machinery, and the case at bar. In the Freehill case, the treasurer could have no duty to perform, and hence no action could accrue against him until there was money in his hands to pay, and as in the Greer county case, or the case of Iron Bridge vs. Otoe, where it was held that no action had accrued against the municipalities until it appeared that there was either money in the treasury, or time sufficient had elapsed for the officers of the municipalities to levy the proper tax and collect the money. But in the case at bar it is conclusive, that this cause of action accrued to the warrant holders in 1894 or in 1895 at the latest because he then brought it the first time..

In those cases where by a reasonable method of construction under a given state of facts, the courts have been able to say that the cause of action had not accrued, they could logically and consistently hold that the statute of limitations had not run, but it would be illogical and not justified by any process of reasoning to hold that where the cause of action had accrued longer ago than the statutory period, that nevertheless, the statutes of limitations would not appiy, and could not operate as a bar. A statute of limitation is as much the law of the land as any other law, and it cannot be arbitrarily set aside or abrogated. To hold that an action had accrued, and at the same time hold that the statute of limitations did not commence to run against it from the time it accrued, would be an arbitrary abrogation of the limitation statute, which cannot be supported or defended by any well considered authority.

4. *That this action is upon a liability created by statute, and is barred by the three year limitations statute.*

It has been finially determined in the case of Turner and Kirkwood vs. The City of Guthrie, supra, that this is a liability created by statute, and hence the three years period of limi-

tation, as provided in the Second sub-division of Section 18 of the Code, must apply.

Commissioners of Graham County vs. Van Slyck, 52 Kan. 622, is an instructive case upon this point. It was an action brought by the county against an ex-county clerk and his bondsmen, to recover fees which he had collected and failed to turn into the county treasury. In the opinion the court say:

"The cause of action alleged, as we think, is one upon a liability created by statute, and should have been brought within three years after it had accrued. * * * An action accrued against the defendant for fees collected and unaccounted for at the quarterly settlement following the receipt of such fees * * * The statutory limitation could not be extended by the failure to demand the payment of the fees collected. * * The cause of action was barred on all the claims included in the petition in January, 1891, although an action on the bond for some purpose might have been brought within a later date. * * * An interpretation of this provision was before the court in Ryus vs. Gruble, 31 Kans. 767, where it was held that the wrongs committed by the defendant were the real substantial foundation for the cause of action, and that the bond was virtually only a collateral security for the enforcement of such cause of action.

"The bond does not give the cause of action; the wrongs or delicts due; and the bond simply furnishes security to indemnify the persons who suffer by reason of such wrongs or delicts; and while the statute cited by plaintiff operates to bar every action brought upon the bond to enforce a cause of action which accrued more than five years prior to the commencement of the action, yet such statute does not operate to suspend the operation of the other statutes of limitation, or to continue in force or revive a cause of action which had already been barred by some one of the other statutes of limitation. Whenever a cause is barred by any statute of limitations, the right to maintain an action therefor upon a bond which simply operates as a security for the same thing must necessarily cease to exist."

"Even if a demand had been necessary, it should have been made within a reasonable time, and there being no good reason for delay the cause of action must have accrued more than three years before its commencement."

And so we submit, in the case at bar, the warrants do not give the cause of action; the wrongs or delicts, complained of do; and while conceeding the rule that the statute of limitations does not run against an action upon a municipal warrant until there is money in the treasury etc., yet such rule does not operate to suspend the operation of other statutes of limitation or to continue in force or revive a cause of action which has been barred by some one of the other statutes of limitation.

5. *That this action not having been commenced within one year from the time the first action was dismissed, it is barred.*

The first action in mandamus having been commenced by Gray Receiver, in 1895, and dismissed by Turner and Kirkwood, on the 28th day of June, 1901, and the time limited for bringing an action having expired, this action should have been brought, under the provision of Section 23 of the Code, above set forth, within a year from the date of the dismissal of the first action, which would have been on or before the 28th day of June, 1902, but it was not brought until the 23rd day of July, 1903, more than two years after the time the gate of indulgence provided in said Section 23 had been closed against them.

6. *That all said warrants having a fixed time of payment, an action accrued on each, when payment was not made at the fixed time.*

We think that a warrant having a fixed time of payment is not subject to the same rule as those warrants having no fixed time of payment. As it was reasoned in King Iron Bridge Co. v. Otoe, supra, that whoever deals with a county and takes in payment of his demand a warrant, *no time of payment being fixed*, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting revenues etc; if this reasoning is correct, we think it follows that where one takes a warrant with a fixed time of payment in the future, he is only required to wait until the

time fixed arrives, to resort to the courts to enforce payment, and we think he must resort to the courts within the period of the statutes of limitation after that time arrives.

In the case of Nash vs. El Dorado, 24 Fed. 252, it was held that the Statute of Limitations ran upon the coupons, sued upon, from the date of their maturity.

Se also the case of Barden vs. The City of Duluth, et al., 28 Fed. 14, wherein it said:

"Where a municipal corporation is authorized by its charter to improve streets, and to assess the costs thereof against adjacent lots, and to issue certificates showing the amount assessed against each lot; and where, by the terms of the charter, these certificates, unless paid within thirty days, are made collectible by a foreclosure action,—the Statute of Limitations begins running against each certificate at the expiration of thirty days."

IN CONCLUSION.

It may be argued that at the time the first suit in mandamus was brought all of the warrants were not due, but we think this is not material. Those having the longest time to run became due on July, 1, 1898 and if the full statutory period were allowed after that date, the action should have been commenced on the 1st day of July, 1901, or even if the five years Statute of Limitations, as for an action on a written instrument could be held to apply, then the action on the longest time warrant should have been commenced on or before the First day of July, 1903, but not having been brought until the 23rd day of July, 1903., this action, so far as all the warrants are concerned, is barred by any and all the provisions of the Limitation Statutes, which might even be suggested, to apply.

Respectfully Submitted
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